Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1979

No. 79-893

James and Linda Roy,

Petitioners,

vs.

Onondaga County Department of Social Services.

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of the State of New York

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Supreme Court of the United States

October Term, 1979
No. .....

IN THE MATTER OF

SHIRLEY ROY
A Child Under Eighteen Years of
Age Alleged to be Neglected By
JAMES AND LINDA ROY,
Petitioners.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of the State of New York

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled case on September 11, 1979, wherein said Court denied their Motion for Leave to Appeal.

OPINIONS BELOW

The Opinion of the Family Court for Onondaga County, New York is not yet reported. Copies of the Order and Opinion are printed in the Appendix hereto, *infra*, pages A3 and A8 respectively. No opinion was handed down by the Supreme Court of the State of New York,

Appellate Division, Fourth Department. A copy of the order is printed at page A2. No opinion was handed down by the Court of Appeals of the State of New York. A copy of the order denying petitioners' Motion for Leave to Appeal is printed at page A1.

JURISDICTION

The judgment of the Court of Appeals of the State of New York denying petitioners' Motion for Leave to Appeal was entered on September 11, 1979. All appeals, applications and motions were timely filed.

The instant petition involves an alleged interference with petitioners' right to the free exercise of their religion under the Constitution of the United States, said interference resulting from a finding by the lower court that their minor child is a neglected child within the meaning of Section 1012(f)(i) of the New York Family Court Act, said finding being grounded on the use by petitioners of reasonable physical discipline administered in accordance with the dictates of their religion. The jurisdiction of the Supreme Court is involved under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

The petition presents one question under the Constitution of the United States:

Whether or not the finding of the lower court that the minor child of the petitioners is a neglected child within the meaning of Section 1012 (f)(i) of the New York Family Court Act, said finding being grounded on the use by petitioners of reasonable physical discipline administered in accordance with the dictates of their religion, results in an

interference with the right to the free exercise of their religion in violation of the First Amendment of the United States Constitution as applied to the States by the Fourteenth Amendment.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute, Section 1012(f)(i) of the New York Family Court Act, which is involved in the question presented is as follows:

> (f) "neglected child" means a child less than eighteen years of age.
>
> (i) whose physical, mental or emotional condition has been impaired or it is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care.

In addition, the following provisions of the United States Constitution are involved in questions presented:

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State de-

prive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Reverend James Roy, as pastor of a fundamentalist Christian church, has attempted to raise his daughter Shirley (the alleged neglected child), along with his other children, under the tenets of his Christian faith. At the trial level, Shirley testified that the religious beliefs of the Roy family and the discipline derived therefrom are based on a fundamentalist Christian doctrine based on a literal interpretation of the Bible as the inerrant Word of God.

On April 25, 1978, petitioner administered between eight and ten "licks" to Shirley's buttocks with a wood cedar strip. Said discipline was the result of a series of disobedient acts on Shirley's part (rejecting her Christian faith, running away from home twice, associating with persons the lifestyles of whom her parents disapproved).

The trial court dismissed the cause against Linda Roy, but found Shirley Roy to be a neglected child within the meaning of Article 10 of the Family Court Act, specifically Section 1012 (f) (i) thereof (Trial Court Opinion App. p. A15). The New York Supreme Court, Appellate Division, Fourth Department affirmed the order of disposition of the lower court (Order of Appellate Court App. p. A2). The Court of Appeals of the State of New York denied petitioner's Motion for Leave to Appeal (Order of the Court of Appeals App. p. A1).

REASONS FOR GRANTING WRIT

In that petitioner's actions in disciplining Shirley were both spiritually (and not merely philosophically) motivated and reasonable in nature, they fall within the scope of the protections of the First Amendment to the U.S. Constitution. Therefore, said actions (and the motivation for such) as an essential part of petitioner's religious beliefs, must be given preferred consideration. *United States v. Seeger*, 380 U.S. 163 (1965); *United States v. Ballard*, 322 U.S. 78 (1944); *see also, Cantwell v. Connecticut*, 310 U.S. 296 (1940) (First Amendment applicable to the States by way of the Fourteenth Amendment).

The physical discipline administered to Shirley was fully within and motivated by biblical commands:

> *PROVERBS 13:24 He that spareth his rod hateth his son: but he that loveth him chasteneth him betimes.*
>
> *PROVERBS 19:18 Chasten thy son while there is hope, and let not thy soul spare for his crying.*
>
> *See also*
>
> *PROVERBS 22:6, PROVERBS 22:15 and PROVERBS 23:13.*

Simply stated, the petitioner's act of administering corporal discipline to his daughter was not only motivated by his religious beliefs but was in and of itself an exercise of his religion. He was complying with a biblical mandate to correct his daughter's unruly behavior.

The religious upbringing of a child is a matter of particular concern to the parent. *Pierce v. Society of Sisters*, 218 U.S. 529 (1925). Only the most compelling state interests can justify interference with this preferred freedom. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert*

v. Verner, 347 U.S. 398 (1963). Petitioner would submit that the State in the instant case has not demonstrated such an interest. With respect to the issue of the reasonableness of the discipline administered, testimony revealed that Shirley had not been struck by petitioners in excess of four years prior to the incident of April 25, 1978. Further, uncontroverted medical testimony showed that she simply was not injured as a result of said discipline.

The petitioner, as a matter of religious conviction, attempts to train and educate his children, including Shirley, in the tenets of his faith, a faith which he truly holds. *See, Ballard, supra; Yoder, supra.* He would further submit that by finding Shirley to be a neglected child within the meaning of Section 1012 subdivision (f) paragraph (i) of the Family Court Act, the lower court has effectively interfered with his right to free exercise of the doctrines of his religion concerning *discipline* of a child, said interference being in violation of the Free Exercise Clause of the First Amendment. *Zorach v. Clauson*, 343 U.S. 306 (1951). The lower courts erred in failing to find a violation of the mentioned constitutional rights of petitioner. A review of the instant by this court is respectfully requested.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK DENYING MOTION FOR LEAVE TO APPEAL

(Dated September 11, 1979)

Mo. No. 869

STATE OF NEW YORK,
COURT OF APPEALS

PRESENT, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

In the Matter of
SHIRLEY ROY, a Child Under Eighteen Years of Age
Alleged to be Neglected by JAMES AND
LINDA ROY,
Appellant,
ONONDAGA COUNTY DEPARTMENT OF
SOCIAL SERVICES,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/S/ JOSEPH W. BELLACOSA
Clerk of the Court

ORDER OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT AFFIRMING THE ORDER OF THE ONONDAGA COUNTY FAMILY COURT

(Entered July 13, 1979)

No. 410

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

PRESENT: DILLON, *P.J.*, SIMONS, HANCOCK, DOERR, MOULE, *JJ.*

In the Matter of Shirley Roy.
JAMES and LINDA ROY,
Appellants.

The above named James and Linda Roy, respondents in this proceeding having appealed to this Court from an order of the Onondaga County Family Court, entered in the office of the Clerk of said court on December 19, 1978 and said appeal having been argued by Charles Craze of counsel for appellants, Nancy Jones of counsel for respondent, Department of Social Services and submitted by Barney Meltzer, Law Guardian and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be, and the same hereby is unanimously affirmed, without costs.

Memorandum: We find no constitutional issue presented in this appeal and we affirm the order on the decision at Family Court, Schneider, *J.*

MARY F. ZOLLER, *Clerk*

ORDER OF DISPOSITION OF THE ONONDAGA COUNTY FAMILY COURT

(Dated December 19, 1978)

At a term of the Family Court of the State of New York, held in and for the County of Onondaga at the Court House in the City of Syracuse, New York on September 20, 21, November 29, 30, 1978

PRESENT:

HONORABLE MORRIS SCHNEIDER
Judge

Docket No. N-83-78

STATE OF NEW YORK
FAMILY COURT COUNTY OF ONONDAGA

In the Matter Of
SHIRLEY ROY
A Child Under Eighteen Years of Age
Alleged to be Neglected by
JAMES and LINDA ROY,
Respondents.

ORDER OF DISPOSITION

APPEARANCES:

DEPARTMENT OF SOCIAL SERVICES, James Morrissey, Esq., of counsel, for the Petitioner.

GIBBS & CRAZE, Charles E. Craze, Esq., of counsel, for the Respondents

BARNEY MELTZER, ESQ., Law Guardian.

This case came before the Court on a petition filed by the Children's Protective Unit of the Department of Social

Services of the County of Onondaga. The petition, pursuant to Article 10 of the Family Court Act, alleged neglect and was brought against James and Linda Roy, parents of the child Shirley Roy. Upon the motion of Charles E. Craze, Esq., attorney for the Respondent, the case against Linda Roy has been subsequently dismissed.

After a lengthy trial of the matter, this Court found that a spanking given to the child Shirley by her father constituted unreasonable and excessive corporal punishment which impaired the child's emotional well-being. The Court stated that in the process of administering this punishment, the Respondent ". . . went beyond the limit of moderate castigation, and in both manner and degree of discipline was guilty of unreasonable and disproportionate violence. . .". After a finding that this kind of action is not protected by the "parental privilege", the Court held that Shirley Roy was a neglected child within the meaning of Article 10 of the Family Court Act. (Family Court Act § 1012, subd. (f), par. (1).)

A dispositional hearing was originally scheduled for September 5, 1978. At that time a stipulation was contemplated between the Respondent and the Department of Social Services, whereby the child Shirley would return home under certain conditions to be agreed upon by the parties. However, Barney Meltzer, Esq., law guardian for the child, refused to join in the stipulation stating that, after a review of the recommendations made by Dr. Pach-Goldman, the psychiatrist currently treating Shirley, and by Mark Clary, the Children's Protective Unit caseworker, he felt that immediate return of the child to her parents may not be in her best interests. This position was restated to the Court by Mr. Meltzer in a subsequent letter in which he demanded that a full dispositional hearing be held.

The matter then came on for a dispositional hearing beginning on the 20th day of September, 1978. The Court, having heard all the witnesses presented by the parties, having considered the reports submitted by the Department of Social Services, the treating psychiatrist, and the Liverpool School System relevant to the child's progress, and having made examinaiton and inquiry into the facts and circumstances of the case and into the surroundings, conditions and capacities of the persons involved, it appears to this Court that the said child's interests would be best served by her reunion with her own family.

It is the stated purpose of this Court to strengthen and promote the family unit, while at the same time being cognizant of the well-being of the individual family members. The Joint Legislative Committee on Court Reorganization which drafted the Family Court Act designed this Court to be a "special agency for the care and protection of the young and the preservation of the family". All too often these two purposes appear to come into conflict. The Court sincerely believes that this is not the case in the instant proceeding. There has been a long separation for the Roy family, and there is naturally a feeling of apprehension about Shirley's return home. This will be a difficult period for all involved, and will require the true spirit of cooperation. The Court is confident that the Roy family will have the strength and understanding necessary to once again make theirs a complete family; it is hereby

ADJUDGED, that Shirley Roy is a neglected child within the meaning of Article 10 of the Family Court Act, and it is therefore

ORDERED, that the said child, Shirley Roy, remain in the custody of the Commissioner of the Onondaga County Department of Social Services and to remain in her present

foster home until the completion of the current school semester in January, 1979 with reasonable visitation during this period, and it is further

ORDERED, that at the conclusion of the present school semester. the said child, Shirley Roy, be returned to the custody of her parents in Norwich, New York, and it is further

ORDERED, that the said child, Shirley Roy, attend an educational institution which is duly accredited by the State of New York, and it is further

ORDERED, that the Reverend and Mrs. Roy participate in a program of family therapy along with their daughter Shirley. Said therapy is to be conducted by an agency agreeable to all parties, and it is further

ORDERED, that an order of protection issue, whereby the Reverend Roy is directed to refrain from using *excessive* corporal means when disciplining the said child, Shirley, and it is further

ORDERED, that Reverend James Roy and Shirley Roy be placed under the supervision of the Onondaga County Department of Social Services for a period of twelve months from the date of this Order. Said supervision shall be transferred to the Chenango County Department of Social Services at such time as Shirley is returned to her parents' home in Norwich, New York.

ENTER,

MORRIS SCHNEIDER
J.F.C.

ORDER OF THE ONONDAGA COUNTY FAMILY COURT

(Dated December 19, 1978)

At a term of the Family Court of the State of New York, held in and for the County of Onondaga at Syracuse, New York on

PRESENT: HON. MORRIS SCHNEIDER, *J.F.C.*

Docket No. N-83-78

In the Matter of
SHIRLEY ROY
A Child under Eighteen Years of Age
Alleged to be Neglected by
JAMES and LINDA ROY,
Respondents.

ORDER

Upon reviewing the papers and proceedings had herein and upon oral argument of the attorneys involved, it is,

ORDERED that the child Shirley Roy be allowed to reside in the foster home of Shirley Smith at Oak Orchard Road, Clay, New York, under the supervision of the Onondaga County Department of Social Services, until further order of this court, effective September 21, 1978, nunc pro tunc; and it is further

ORDERED that service by ordinary mail of a copy of this order upon counsel for the parties herein shall be deemed good and sufficient service.

/s/ MORRIS SCHNEIDER, *J.F.C.*

OPINION OF THE ONONDAGA COUNTY FAMILY COURT

(Dated August 23, 1978)

At a term of the Family Court of the State of New York, held in and for the County of Onondaga at the Court House in the City of Syracuse, New York on May 22, 23 and July 6, 1978

PRESENT:

HONORABLE MORRIS SCHNEIDER
Judge

Docket No. N-83-78

STATE OF NEW YORK
FAMILY COURT COUNTY OF ONONDAGA

In the Matter of
SHIRLEY ROY
A Child Under Eighteen Years of Age
Alleged to be Neglected by
JAMES and LINDA ROY,
Respondents.

DECISION

APPEARANCES:

DEPARTMENT OF SOCIAL SERVICES, Clifford LaBarge, Esq., of counsel, for the Petitioner.

GIBBS & CRAZE, Attorneys for the Respondents.

BARNEY MELTZER, ESQ., Law Guardian for the child, Shirley Roy.

A. FACTS

This case has come before the Court on a petition filed by Robert Hadzor, a caseworker employed by the

Children's Protective Unit of the Department of Social Services of the County of Onondaga. The petition, alleging neglect, was brought against James and Linda Roy, parents of the child Shirley Roy. The question for determination by the Court is whether the corporal punishment administered by the child's father was excessive.

During the month of February, 1978 the Onondaga County Department of Social Services (Department) was advised by the New York State Department of Social Services that a report had been received alleging that the child, Shirley Roy, had run away from home and was afraid to return for fear of being punished. On April 10, 1978 a second report was received by the Department from a citizen stating that Shirley Roy had come to her residence and was afraid that she would be beaten if she returned home. Again on April 26, 1978, the same citizen contacted the Department to report that she had received a telephone call from Shirley Roy who said that she had been beaten by her father. At that time, Robert Hadzor and Barbara Dubnoff, both caseworkers for the Children's Protective Unit of Onondaga County Department of Social Services, visited the Roy home and spoke with the child and Linda Roy. Ms. Dubnoff examined the child at that time. Based on their findings an Order was signed by the Honorable Edward J. McLaughlin, Judge of the Family Court, directing that Shirley be temporarily removed from her home and placed in a foster home under the supervision of the Department. She was then taken to the Upstate Medical Center where she was examined by Dr. John A. Friedman. Shirley was found to have severe bruises on her buttocks and on her right forearm which she attributed to a beating received from her father.

Shirley testified that on April 25, 1978, upon returning from a trip to Virginia, she was punished severely by her

father for what he termed ". . . rebelling against God and . . . rebelling against your parents". According to Shirley, her father beat her repeatedly with a wooden shingle, hitting her both on the buttocks and on the right arm. The beating continued until the child promised not to call her friend or the Children's Protective Division.[1] She further testified that spanking was a regular form of punishment in her home, as in the past both parents had punished her by striking her with a belt.

A petition alleging neglect was served upon James and Linda Roy, and the trial of this matter began on May 22, 1978. Upon the Motion of Charles E. Craze, Esq., attorney for the Respondent, the case against Linda Roy was dismissed.

NOTE: The Court notes that no unfavorable inference may be drawn against the Respondent nor may he be prejudiced in any way by the fact that he did not testify in his own behalf at the trial of this matter.

B. LEGAL ISSUES

Maltreatment of children has been justified for centuries on the principle that corporal punishment was required either to maintain discipline, to transmit educational ideas or to please certain gods. (Radbill, *A History of Child Abuse and Infanticide in the Battered Child,* p. 3.) Ancient Roman law gave the father, as head of the family, a power of life and death over his family, holding that he who gave life also could take it away. This severe ap-

1. Shirley Roy testified that her father struck her six or seven times with the wooden shingle, then stopped, saying, "Now are you not going to call Audrey and Mrs. Parker and not going to call the Children's Protective Agency?". When Shirley replied, "No", she was struck six or seven more times. Finally, when her father again asked, "You're not going to call them any more?", the child answered, "Yes, yes, I won't call them.".

proach has received gradual modification throughout the history of our English common law, but still the parent, "has power sufficient to keep the child in order and obedience. He [the parent] may lawfully correct his child . . . in a reasonable manner, for this is for the benefit of his education".

(1 Bl. Comm. 452.)

Thus, a parent charged with the training and education of his child traditionally has the right to exercise control and restraint and to adopt necessary disciplinary measures. In New York State, the parent is responsible for every facet of the child's life, from medical care to education and discipline, until the child reaches the age of twenty-one. (Penal Law, § 35.10, subd. 1 and Family Court Act § 413.) The former Domestic Relations Court of the City of New York dealt with this issue in 1940, and found that,

> "A parent certainly has the right, indeed it is his duty, to correct any act of misconduct on the part of his child. . . A parent is both in law and by nature charged with the obligation to guide and, in guiding, aid his child on the path which, of necessity, by reason of the child's immaturity, he stumbles over." (*Matter of Carl,* 174 Misc. 985, 22 N.Y.S. 2d 782.)

The right of parents to chastise their disobedient children is so necessary to the government of families and to the good order of society that neither this nor any other court should think to deny it or interfere with its existence. Nevertheless, the law has, in regard for the safety of the child, prescribed bounds beyond which this right shall not be carried. The right of chastisement is said to be "founded on the welfare of the child, not on the parent's liberty of action". (*People v. Green,* 155

Mich. 524, 119 N.W. 1087.) Hence, the right of a parent to discipline his child clearly has its limits. If the limits are exceeded then the parent may be civilly or criminally liable. (Family Court Act, § 1012, subd. (f), par. (i) and Penal Law § 35.10, subd. 1.)

Monrad Paulsen, Esq., a noted legal scholar in the area of family law, reviewed this parental privilege in relation to neglect proceedings and found that the privilege exists "only so far as the purpose for imposing punishment is correction and the force employed is moderate in amount". (66 Columbia Law Review 679).

The privilege has been codified in New York under the Penal Law §35.10, subd. 1. This section applies not only to parents but also to teachers, guardians and those entrusted with the care of minors and incompetents. Physical force is thus allowed to be used upon children only "when and to the extent that he [parent] reasonably believes it necessary to maintain discipline or to promote the welfare of such person". (Penal Law, § 35.10, subd. 1.) Further clarification as to the limits of this privilege is provided in the Family Court Act §1012, subd. (f), par. (i). That section labels a child as "neglected", if as the result of his parents unreasonable infliction of corporal punishment, he is in danger of becoming physically, mentally, or emotionally impaired. The Court in *Matter of Carl* (*supra*), examined the effect of the punishment on the child and emphatically held that "no human being has the right to beat a child with a broomstick . . . to the extent that . . . the child might have black and blue marks".

So, too, any potential for future danger to the child is carefully evaluated when examining an alleged incident of excessive corporal punishment. In *Matter of Alan D. M. v. Nassau County Department of Social Services,* 58 A.D.

2d 111, 395 N.Y.S. 2d 666, the Appellate Division, Second Department, reviewed the severe spanking of a young child by his adoptive mother. Though finding in favor of the parent, the court noted its disapproval of a spanking which left bruises on the buttocks and upper thighs of a child. In deciding to return the child to his adoptive parents, the court relied on the sincerity of the mother's remorse and the impression that this was an isolated incident not likely to recur.

Confrontations between teacher and pupil produce an abundance of litigation concerning corporal punishment. Though these cases present a somewhat different problem than the parent and child situation, they do attempt to establish standards of reasonableness appropriate to the issue at bar. The Appellate Division, Second Department, found that officials in a school stand in *loco parentis,* and while acting in that capacity they may "exercise such powers of control, restraint and correction over pupils as is reasonably necessary to facilitate the educational functions of a school". (*Matter of Ronald B.,* 61 App. Div. 2d 204, 401 N.Y.S. 2d 544.) The U.S. Supreme Court has also recently examined the issue of corporal punishment in the schools. In the majority opinion, Mr. Justice Powell upheld the Florida public school practice of paddling misbehaving students. Under the Florida law the teacher "must exercise prudence and restraint" for if later investigation discloses that the punishment was excessive—"not reasonably believed at the time to be necessary for the child's discipline or training"—then school officials may be liable. (*Ingraham v. Wright,* 430 U.S. 651, 97 S. Ct. 1401.) In 1974 the Illinois Supreme Court found that a teacher who struck a student on the buttocks with a wooden paddle several times was guilty of the offense of battery. The court explained that a teacher's right

to discipline students within his charge in school is subject to the same standard of reasonableness which is applicable to parents in disciplining their own children. (*People v. Ball*, 58 Ill. 2d 36, 317 N.E. 2d 54.)

The courts and lawmakers in New York have as yet failed to articulate a precise standard regarding the reasonable use of corporal punishment towards children. Rather, the courts have looked into all the circumstances of the cases, and to the parties involved, and demanded that the parent or those acting in *loco parentis* must not exceed the bounds of moderation, and must not be cruel or merciless. Further, consideration is taken of the nature of the child's offense, his motive for such an offense, and the sex, age, and physical and mental condition of the child. Currently, these considerations are spelled out in the Restatement of Torts 2d § 150 and 151.

In a case decided in this county, the Family Court reviewed allegations of excessive corporal punishment against the mothers of several young children. It found that "the means of punishment employed is a critical factor to be considered. Moderate means have long been equated with reasonableness." (*Matter of Rodney C.*, 91 Misc. 2d 677, 398 N.Y.S. 2d 511.) Likewise, the court in *Matter of Carl*, (*supra*) held that "a parent may correct, but he has not the right in correcting to inflict physical punishment of a character which is brutal. . .".

Keeping in mind all of the above-mentioned factors, this Court makes the following findings:

1. That the spanking given to this fourteen-year-old girl by her father left severe bruises on her buttocks and arm and was thus unreasonable and excessive corporal punishment.

2. That punishment of this type, even when administered by her father, is degrading to a 14 1/2-year-old female child and has led to impairment of her emotional well-being.

3. That the use of a wooden shingle to discipline a child of that age was beastly and unreasonable and dangerous to her physical, mental and emotional well-being.

4. That at previous times the father has administered punishment to the child Shirley by means of whipping with a belt.

5. That while inflicting punishment upon his child, the Reverend James Roy went beyond the limit of moderate castigation, and in both manner and degree of discipline was guilty of unreasonable and disproportionate violence, and such action was not protected by the parental privilege.

I, therefore, find Shirley Roy to be a neglected child within the meaning of Article 10 of the Family Court Act. (Family Court Act § 1012, subd. (f), par. (i).)

ENTER,

/s/ MORRIS SCHNEIDER *J.F.C.*

Supreme Court, U. S.
FILED
JAN 22 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-893

JAMES AND LINDA ROY,

Petitioners,

— *vs.* —

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondent.

On Petition for A Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-893

JAMES AND LINDA ROY,

Petitioners,

— *vs.* —

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondent.

On Petition for A Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Onondaga County Department of Social Services, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Judgment of the Court of Appeals of the State of New York entered in the above entitled case on September 11, 1979.

QUESTION PRESENTED

Whether the finding of the trial court that the Petitioners' minor child is a neglected child within the meaning of Section 1012(f)(i) of the New York Family Court Act, said finding being grounded on the use by Petitioners of unreasonable and excessive corporal punishment, results in an interference with the right to the free exercise of Petitioners' religion in violation

of the First Amendment of the United States Constitution as applied to the States by the Fourteenth Amendment.

STATEMENT OF FACTS

On April 8, 1978, 14 year-old Shirley Roy ran away from home. While at a friend's house she had contact with a caseworker from the Onondaga County Department of Social Services Children's Protective Division. Shirley expressed her fear to the caseworker that she would be beaten by her father if she were to return home.

On April 17, 1978 Shirley returned home and was taken the next day to the State of Virginia by her parents to live temporarily with a Baptist minister and his family.

On April 25, 1978 Shirley returned home from Virginia at approximately 11:00 a.m. Later that afternoon she was severely spanked by her father with a wooden shingle. This spanking consisted of 12 to 14 blows to Shirley's buttocks and arm.

Children's Protective Division removed Shirley from her home pursuant to a Court Order on April 26, 1978 after a medical examination determined that the spanking had resulted in severe bruising.

Subsequent to the temporary removal, respondent filed a neglect petition against James and Linda Roy pursuant to Article 10 of the New York Family Court Act. That neglect petition was tried in the Onondaga County Family Court during the Summer of 1978 and an Order dated August 23, 1978 held Shirley to be a neglected child within the meaning of Article 10 of the Family Court Act. Petitioners here appealed said decision and its accompanying Dispositional Order to the New York Supreme Court Appellate Division which unanimously affirmed the lower court finding of neglect and found that there was no constitutional issue to be decided in this case. The case was then brought before the New York State Court of Appeals by Motion for Leave to Appeal, which was summarily denied.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioners have not met the jurisdiction requirements of this Court.

Rules 23 and 15 of the Supreme Court Rules require parties seeking review of a Judgment of a State Court to specify in the Petition for Certiorari, the stage in the proceedings in the Court of first instance and in the Appellate Court, at which, and the manner in which, the Federal questions sought to be reviewed were raised. Petitioners have not addressed this jurisdictional requirement in their Petition. Therefore, the petition is defective on its face and it should be denied.

2. There is no Constitutional issue in this case.

A. A Federal question was not raised in the New York State Courts.

It is a long standing rule that the Supreme Court is not vested with jurisdiction unless a Federal question was raised and decided below. *Crowell* v. *Randall*, 35 U.S. 368, 391 (1836); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1968). There are sound policy reasons for such a rule in that review by the State courts will assure an adequate record and provides the States with an opportunity to make a definitive interpretation of their Statutes. *Hill* v. *California*, 401 U.S. 797, 805 (1970). While the issue of whether a Federal question was sufficiently and properly raised in the State court is itself ultimately a Federal question, *Street* v. *New York*, 394 U.S. 576, 581-585 (1969) the State procedure usually determines the method to be used in raising the Federal question. *In re Lamkin*, 355 U.S. 59 (1957); *Ferguson* v. *Georgia*, 365 U.S. 570, 572 at note 1 (1961).

New York Practice provides that a New York Appellate Court will not review any points not raised in the court below. See *Kolmer-Marcus, Inc.* v. *Winer*, 32 A.D.2d 763 (1st Dep't., 1969), aff'd 26 N.Y.2d 795 (1970); also see N.Y.C.P.L.R. § §4017 and 5501.

In the present case the Constitutional issue of religious freedom was never raised by Petitioners until the appeal, and then was raised as an ancillary issue. The sole issue presented to the Court at trial was whether Shirley Roy was a neglected child pursuant to the New York Family Court Act. The Court found after a full adversary hearing, that she was a neglected child. See *Opinion of Judge Morris Schneider* of the Onondaga County Family Court appearing in the Appendix to Petition for Certiorari at A8.

The Fact Finding Hearing was held to determine whether reasonable force was used in the discipline of Shirley Roy. There is no question that the Petitioners are entitled to use reasonable corporal punishment in the discipline of their child. However, when discipline becomes unreasonable in nature, it is grounds for a finding of neglect under Article 10 of the New York Family Court Act.

Section 1012(f)(i) of the Article states:

"(f) "Neglected child" means a child less than eighteen years of age

(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care

(A) in supplying the child with adequate food, clothing shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by using a drug or drugs; or by using alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court . . ."

The question of reasonableness was a question to be decided by the fact finder, who heard the testimony and saw the witnesses. The fact finder in this case, Judge Morris Schneider, found that unreasonable and excessive corporal punishment was used, and subsequently that Shirley Roy was a neglected child pursuant to the New York Family Court Act.

The Appellate Courts agreed. The Appellate Division of the New York Supreme Court specifically found that this case presented no constitutional issue and unanimously affirmed the trial court order. Subsequently, the New York Court of Appeals denied the Motion for Leave to Appeal.

B. New York State has a compelling State interest to protect its children.

New York has declared that the purpose of Article 10 of the New York Family Court Act is "to help protect children from injury or mistreatment and to help safeguard their physical, mental and emotional well being . . ." §1011 New York Family Court Art. These are legitimate state interests, well within the State Legislative power to control. See *Stanley* v. *Illinois*, 405 U.S. 645, 652 (1972). The State has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and this includes to some extent matters of conscience and religious conviction. *Prince* v. *Massachusetts*, 321 U.S. 158, 167 (1944).

In this case the trial court found that a child was neglected as the result of unreasonable and excessive corporal punishment. The State has a compelling interest to protect children from just such physical injury.

C. The acts of Petitioners went beyond the scope of the religion guarantee embodied in the First Amendment as applied to the States by the Fourteenth Amendment.

This Court has held that the First Amendment right to free exercise of a citizen's religious belief encompasses both

freedom of belief and freedom to act in accordance with one's religious convictions. *Reynolds* v. *U.S.*, 98 U.S. 145 (1878). In a case cited by Petitioners, *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) the freedom to hold a religious belief was differentiated from the freedom to act on the basis of one's religious convictions in that the freedom to hold a religious belief is absolute, but the freedom to act on the basis of that belief can be limited when the action conflicts with a compelling state interest. *Cantwell, supra* at 303-304.

Freedom to hold a religious belief is not at question in this case. The trial court's finding of neglect did not prohibit the free exercise of Petitioners' religion. What it did do, however, was to hold that Petitioner's *conduct* went beyond what was reasonable under the circumstances.

Petitioners' assertion of rights pursuant to the First and Fourteenth Amendments is not sufficient to protect unreasonable conduct. The freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. *Braunfeld* v. *Brown*, 366 U.S. 599, 603 (1961). The New York Legislature's goal of protecting the safety of children as expressed in Article 10 of the Family Court Act is a compelling state interest which legitimately limits the rights of parents under the First Amendment. The right to practice religion freely does not include liberty to expose a child to ill health or death. *Jehovah's Witnesses in Washington* v. *King County Hospital*, 390 U.S. 598 (1968) aff'g per curiam 278 F. Supp. 488, reh. den 391 U.S. 961.

3. **The cases relied upon by Petitioners can be distinguished from the present case.**

There is no dispute that Petitioners have a right to instill their religious beliefs into the training of their children. The cases cited in the Petition for Certiorari clearly outline that right, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Zorach* v. *Clauson*, 343 U.S.

306 (1952). However, the foregoing cases, which speak to the freedom to educate children in a manner in keeping with the family religion cannot be extrapolated to cover child beating. In the fact finding of this case the issue of education was never raised. Cases discussing education are, therefore, irrelevant to the present case.

Other cases cited by Petitioners are related to attacks upon the philosophical beliefs of a citizen's religion. *U.S.* v. *Ballard*, 322 U.S. 78 (1944); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). These cases have no bearing on the present case, in that the truth or veracity of the religious beliefs held by Petitioners was never questioned.

In summary, Petitioners have cited no cases to link the First and Fourteenth Amendment rights with the amount of corporal punishment to be used in disciplining a child.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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